Inai Bina Sdn Bhd v Mohd Rizzal bin Shamat (t/a Kejuruteraan Perdana Teguh) (Bintang Kencana Sdn Bhd, third party)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-117–03 OF 2014
LIM CHONG FONG JC
12 MAY 2015

Civil Procedure — Striking out — Application to strike out third party action — Failure to take out summons for directions on time — Third party notice devoid of particulars — No privity of contract between plaintiff and third party — No monies owing by third party — No reasonable cause of action disclosed against third party — Whether claim against third party frivolous and vexatious and an abuse of court process — Rules of Court 2012, O 16 r 4 & O 18 r 19

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The third party appointed the defendant as subcontractor for the construction and completion of a school ('the works'). In turn, the defendant entered into a joint venture agreement with the plaintiff to undertake the works wherein all proceeds from the contract would be shared between the defendant and the plaintiff at 8% and 92% respectively. The works were completed and a final interim certificate was issued by the third party to the defendant certifying the final sum of RM300,000 payable to the defendant. The final interim certificate was accepted and endorsed by the defendant and the defendant received payment pursuant to the interim final certificate. As required by the contract, the defendant provided to the third party a statutory declaration that there was no further sum due to the defendant. The plaintiff alleged that the defendant did not pay the plaintiff the sum of RM2,037,459.23 pursuant to the JV agreement for work done and thus commenced this action against the defendant. The defendant consequently commenced the third party action against the third party for indemnity. The third party applied to strike out the defendant's third party action pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC') on the grounds that: (a) the defendant had failed to take out the summons for directions under O 16 r 4 of the ROC; (b) the third party notice

was devoid of particulars of how the third party was responsible for payment to the plaintiff; (c) there was no privity of contract between the plaintiff and the third party; and (d) the third party had settled its obligations by the payment of the RM300,000. The defendant denied that the RM300,000 payment was final settlement on the grounds that it was subject to the agreement of the plaintiff. The defendant also denied making the statutory declaration and claimed that the statutory declaration was procured by way of fraud or forgery.

Held, allowing the application:

(1) It was plain and obvious that the defendant failed to disclose a reasonable cause of action against the third party and the third party was accordingly entitled to have the third party notice struck out (see para 24).

(2) There was no privity of contract between the plaintiff and the third party. The parties had conducted themselves in an entirely independent manner and footing. From the perusal of the JVA, it was also clear there was no provision that the payment receivable by the defendant pursuant to the contract was subject to the agreement of the plaintiff contrary to that as asserted by the defendant (see paras 25–26).

(3) The defendant did not challenge but instead accepted the third party's certification notwithstanding that it might not have been agreed to between the defendant and the plaintiff. The defendant would have been able to maintain the third party action if it had not compromised the claim but instead defend the plaintiff's claim and at the same time seek an indemnity from the third party, to be all assessed by the court. Put simply, the compromise was fatal to the defendant. The evidence of the defendant's compromise was plainly seen in its endorsement on the third party's final interim certificate (see paras 28–29).

(4) The defendant's averment that another individual passing off as Mohd Rizzal had made the statutory declaration using a false identity card was not supported by contemporaneous police report and/or a hand writing expert report confirming that the signature on the statutory declaration and the payment voucher was forged. They were bare denials (see paras 32–33).

(5) The defendant did not challenge its own contemporaneous endorsement in the final payment certificate. More importantly, the defendant ignored the fact that it had encashed the cheque of RM300,000 that could not otherwise have been received by the defendant if the payment voucher was indeed forged by another unknown individual (see para 35).

(6) It was plain and obvious that the defendant's claim for indemnity against the third party was frivolous and vexatious as well as an abuse of court process (see para 36).

[Bahasa Malaysia summary

Pihak ketiga telah melantik defendan sebagai subkontraktor untuk pembinaan dan penyiapan sebuah sekolah ('kerja tersebut'). Seterusnya, defendan telah memasuki perjanjian usahasama dengan plantif untuk melaksanakan kerja tersebut di mana semua hasil daripada kontrak itu akan dikongsi antara defendan dan plaintif, masing-masing pada kadar 8% dan 92%. Kerja tersebut telah disiapkan dan satu sijil akhir sementara telah dikeluarkan oleh pihak ketiga kepada defendan mengesahkan jumlah akhir RM300,000 boleh dibayar kepada defendan. Sijil akhir sementara itu telah diterima dan diindorskan oleh defendan dan defendan telah menerima bayaran berikutan sijil akhir sementara. Sepertimana dikehendaki oleh kontrak itu, defendan memberikan kepada pihak ketiga satu deklarasi statutori bahawa tidak terdapat jumlah selanjutnya kepada defendan. Plaintif mengatakan bahawa defendan tidak membayar plaintif sejumlah RM2,037,459.23 menurut perjanjian usahasama untuk kerja yang dibuat dan oleh itu memulakan tindakan ini terhadap defendan. Defendan kemudian telah memulakan tindakan pihak ketiga terhadap pihak ketiga kerana indemniti. Pihak ketiga telah memohon untuk membatalkan tindakan pihak ketiga defendan menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KM') atas alasan-alasan bahawa: (a) defendan telah gagal untuk mengeluarkan saman untuk arahan di bawah A 16 k 4 KM; (b) notis pihak ketiga tidak mempunyai butiran tentang bagaimana pihak ketiga bertanggungjawab untuk bayaran kepada plaintif; (c) tiada priviti kontrak di antara plaintif dan pihak ketiga; dan (d) pihak ketiga telah menyelesaikan obligasinya dengan membayar RM300,000. Defendan telah menafikan bahawa bayaran RM300,000 merupakan penyelesaian akhir atas alasan bahawa ia tertakluk kepada perjanjian plaintif. Defendan juga menafikan telah membuat deklarasi statutori dan mendakwa bahawa deklarasi statutori itu telah diperoleh melalui fraud atau penipuan.

Diputuskan, membenarkan permohonan:

(1) Ia adalah jelas dan nyata bahawa defendan telah gagal untuk menunjukkan sebab munasabah untuk tindakan terhadap pihak ketiga dan pihak ketiga sewajarnya berhak untuk membatalkan notis pihak ketiga itu (lihat perenggan 24).

(2) Tiada priviti kontrak antara plaintif dan pihak ketiga. Pihak-pihak telah bertindak dengan cara dan asas yang bebas sepenuhnya. Setelah meneliti perjanjian usahasama itu, ia juga jelas tiada peruntukan bahawa bayaran yang boleh diterima oleh defendan itu menurut kontrak adalah tertakluk kepada perjanjian plaintif yang bercanggah dengan apa yang ditegaskan oleh defendan (lihat perenggan 25–26).

(3) Defendan tidak mencabar tetapi sebaliknya menerima pengesahan pihak ketiga meskipun ia bukan yang dipersetujui antara defendan dan plaintif. Defendan mungkin boleh mengekalkan tindakan pihak ketiga jika ia

tidak berkompromi degan tuntutan itu tetapi sebaliknya telah membela tuntutan plaintif dan pada masa sama memohon indemniti daripada pihak ketiga, agar ditaksir kesemuanya oleh mahkamah. Secara ringkas, kompromi itu memudaratkan defendan. Keterangan kompromi defendan jelas dilihat dalam pengindorsannya pada sijil akhir sementara pihak ketiga (lihat perenggan 28–29).

(4) Penegasan defendan bahawa keliruaan individu lain seperti Mohd Rizzal telah membuat deklarasi statutori menggunakan kad pengenalan palsu yang tidak disokong oleh laporan polis semasa dan/atau laporan pakar tulisan tangan yang mengesahkan bahawa tandatangan pada deklarasi statutori dan baucar bayaran telah dipalsukan. Ianya penafian kosong (lihat perenggan 32–33).

(5) Defendan tidak mencabar pengendorsan semasa dalam sijil bayaran akhir. Lebih penting lagi, defendan tidak menghiraukan fakta bahawa ia telah menukar cek RM300,000 kepada wang tunai yang mungkin sebaliknya diterima oleh defendan jika bayaran baucar itu sememangnya telah dipalsukan oleh individu (lihat perenggan 35).

(6) Adalah jelas dan nyata bahawa tuntutan defendan untuk indemniti terhadap pihak ketiga remeh dan menyusahkan juga penyalahgunaan proses mahkamah (lihat perenggan 36).]]

Notes

For cases on striking out in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8706–9062.

For cases on third party proceedings in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 10174–10205.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Benzteel Sdn Bhd v United Trade Arena (M) Sdn Bhd & Another Appeal [2011] 1 LNS 1185, HC (distd)

BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821, CA (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (refd)

Microsoft Corporation v Yong Wai Hong [2008] 3 MLJ 309, CA (refd)

Legislation referred to

Rules of Court 2012 O 16 r 4, O 18 r 19

Mohd Hafizullah bin Abdullah (M Faisallah, Hafizul & Partners) for the defendant.

Vishal Kumar (Sean Denis with him) (James Monteiro) for the third party.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an interlocutory application (encl 35) filed by the third party in a construction contract matter to strike out the defendant's third party action pursuant to O 18 r 19 of the Rules of Court 2012.

[2] The affidavits filed by the parties for purposes of the application were:

(a) the third party's affidavit-in-support of Ahmad Raziff bin Abu Bakar affirmed on 3 March 2015;

(b) the defendant's affidavit-in-reply of Mohd Rizzal bin Shamat affirmed on 10 March 2015;

(c) the third party's affidavit-in-reply of Ahmad Raziff bin Abu Bakar affirmed on 27 March 2015; and

(d) the third party's notice of intention to rely on the defendant's affidavit-in-support of Mohd Rizzal bin Shamat affirmed on 24 April 2014 for purposes of the defendant's application to strike out the plaintiff's action.

[3] After reading the written submissions filed by the parties, I heard counsel on 8 and 15 April 2015.

[4] On 15 April 2015, I allowed the third party's application as orally amended with costs of RM3,000.

[5] The defendant is dissatisfied with my decision and has on 28 April 2015 filed a notice of appeal to the Court of Appeal.

[6] Consequently, I set out herein below the grounds of my decision.

SALIENT FACTS

[7] By a letter of award dated 4 August 2008 ('the contract'), the third party appointed the defendant as subcontractor for the construction and completion of a school ('the works') for the sum of RM8,727,554.35 on a provisional quantity basis subject to re-measurement on completion.

[8] In turn, the defendant entered into a joint venture agreement with the plaintiff dated 11 March 2009 ('the JV agreement') to undertake the works

wherein all proceeds from the contract would be shared between the defendant and the plaintiff at 8% and 92% respectively.

[9] During the course of undertaking the works, the interim payments were made by the third party to the defendant.

[10] The works were completed and a final interim certificate dated 1 February 2013 was issued by the third party to the defendant certifying the final sum of RM300,000 payable to the defendant. The final interim certificate was accepted and endorsed by the defendant.

[11] The defendant received the payment pursuant to the aforesaid interim final certificate. As required by the contract, the defendant provided to the third party a statutory declaration dated 1 February 2013 that there was no further sum due to the defendant.

[12] The plaintiff alleged that the defendant did not pay the plaintiff the sum of RM2,037,459.23 pursuant to the JV agreement for work done.

[13] Thus the plaintiff commenced this action against the defendant on 10 March 2014 and the defendant consequently commenced the third party action against the third party by filing a third party notice dated 11 September 2014 for indemnity of the plaintiff's claim from the third party.

CONTENTIONS OF THE THIRD PARTY

[14] Firstly, the third party contended that the defendant todate failed to take out the summons for directions under O 16 r 4 of the Rules of Court 2012 after the third party had entered appearance on 5 December 2014. The third party notice filed by the defendant merely stated that the defendant is entitled to an indemnity from the third party being the party responsible to make payment to the plaintiff.

[15] The third party further contended that there was no privity of contract between the plaintiff and the third party at all material times. The chain of contracts were between the third party and the defendant followed by the defendant and the plaintiff. The transactions and arrangements that took place during the course of the works were also independent and done between the contracting parties only.

[16] In addition, the third party contended that the third party and the defendant had settled all their respective obligations between them by the payment of the RM300,000 pursuant to the interim final certificate dated

1 February 2013. Consequently, there is no basis whatsoever for the defendant to seek an indemnity from the third party for the claim made by the plaintiff against the defendant.

CONTENTIONS OF THE DEFENDANT

[17] The defendant responded by contending that the work done by the plaintiff was for the benefit and with the knowledge of the third party.

[18] The defendant denied that the RM300,000 payment of the third party was final settlement because it was subject to the agreement of the plaintiff and in this connection the defendant also denied making the statutory declaration on 1 February 2013. In other words, the statutory declaration was procured by way of fraud or forgery according to the defendant.

FINDINGS OF THE COURT

[19] Order 18 r 19 of the Rules of Court 2012 provides as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under subparagraph (1)(a).

[20] In the supreme court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, Mohamed Dzaiddin SCJ (as he then was) held at p 43 as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* 7) *and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (see *AG of Duchy of Lancaster v L & NW Rly Co 8*). *It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence* (see *Wenlock v Moloney & Ors* 9). The authorities further show that if there is a point of

A law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

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[21] More recently in the court of appeal case of *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021, Zulkefli Makinudin JCA (now CJ Malaya) summarised it as follows at para 12:

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[12] We find it is most appropriate here to state the well established principle in that the power of striking out pleadings under O 18 r 19 of the RHC as invoked by the appellant in this case is too well-known that it can only be exercised when the respondent's claim on the face of it is obviously bound to fail.

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No reasonable cause of action

[22] The contention of the third party here is that the defendant's third party notice on its face revealed no sustainable cause of action against the third party. The notice per se was devoid of particulars of how the third party is responsible for payment to the plaintiff. It seems that the defendant has further forfeited its right to plead its third party claim properly by its failure to take out third party summons for direction.

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[23] In *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 821, Sulaiman Daud JCA said the following at pp 829–830:

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[23] From the authorities aforesaid, it can be seen that there are many ways in which a right of indemnity may arise. As such, in our view, in order to maintain a claim for indemnity as in the present case, the respondent not only has to plead that the appellant was in breach of its contractual duty or its duty of care to him but also the cause or causes of action for such an indemnity, ie whether founded on an express or implied contract, or on an implied indemnity arising from the relationship between the parties.

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[28] From the respondent's statement of claim as summarised above, we agree with learned counsel for the appellant that neither an express or implied contract of indemnity, nor any other basis of indemnity, were pleaded as the basis for his claim for an indemnity. In our view, where a person A is claiming to be indemnified by B in respect of his liability to C, he must plead with clarity the basis of his entitlement to such an indemnity, ie whether it arises from any breach of contract, express or implied, or from any breach of duty of care, or otherwise to be implied from the nature of their relationship. It is not sufficient for him to merely include a prayer for an indemnity in the statement of claim without first stating the facts upon which such claim is founded.

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[24] In the premises, I am of the view it is plain and obvious that the defendant failed to disclose a reasonable cause of action against the third party and the third party is accordingly entitled to have the third party notice struck out: see para 16/4/6 *Malaysian Civil Procedure 2013*.

Frivolous and vexatious claim and abuse of process

[25] On the facts of this case based on the affidavit evidence adduced, I am satisfied that there was no privity of contract between the plaintiff and the third party. No doubt the contract and the JVA touched on the same subject matter in relation to the project, the parties have from the evidence disclosed in the affidavits conducted themselves in an entirely independent manner and footing, to wit: the third party via a vis the defendant and the defendant vis a vis the plaintiff separately. This is fortified by the defendant's explanation that the contractual relationship between the plaintiff was in fact a subcontract couched as a JVA to avoid the possible termination of the contract by the third party for subcontracting without prior written consent.

[26] From the perusal of the JVA, it is also clear there is no provision that the payment receivable by the defendant pursuant to the contract was subject to the agreement of the plaintiff contrary to that as asserted by the defendant.

[27] The defendant nevertheless referred to the High Court case of *Benzteel Sdn Bhd v United Trade Arena (M) Sdn Bhd & Another Appeal* [2011] 1 LNS 1185 in attempt to justify the defendant here seeking for an indemnity from the third party in a chain of contracts. In that case Mah Weng Kwai J (as he then was) said as follows:

> 11.4.5. To reiterate, the Court having entered judgment by admission against the Defendant for the agreed damages in the sum of RM2,331,520 then went on to enter judgment for the damages against the Third Parties to indemnify the Defendant. However, it was ordered that the Third Parties are not to pay the Defendant but to pay the Taiwanese company in the event the Taiwanese company is able to establish its claim against the Plaintiff in Malaysia.
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> 1.4.12. The Defendant was held liable and looked towards the Third Parties for indemnity and contribution towards payment of the Deposit and the agreed damages. The Third Parties have been held liable mainly on the ground that the Third Parties failed to deliver a FPT System that could work at the Defendant's fish farm. In turn, the Third Parties looked towards the Fourth Party for indemnity and contribution towards their liability for the Deposit and the agreed damages to the Defendant.
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> 11.4.13. In the final analysis, the Court found as of fact that the Fourth Party had failed to deliver a FPT System that worked to the Third Parties, as they were contractually bound to do. Without acquiring the FPT System that could work efficiently and properly, the Third Parties were not in a position to similarly deliver a working FPT System to the Defendant. The Court was satisfied that the Third

A Parties were put into a position where they could not meet their contractual obligations to the Defendant due to the breaches by the Fourth Party of the contracts entered into between the Third Parties and the Fourth Party.

12. In the result, judgment was entered against the Fourth Party to indemnify the Third Parties for the payment of the Deposit and the agreed damages together with B interest and costs, in the event the Third Parties have to pay out to the Taiwanese company.

[28] The case of *Benzteel Sdn Bhd* is clearly distinguishable because it C concerned the quality of the subject matter supplied of which ultimate liability must be traced to the supplier, to wit, the third party therein. It is observed that there was no compromise made by any of the parties therein. In this case, it concerns payment that is to say the flip side of the consideration of a contract. Notwithstanding there is the claim for payment by the plaintiff for work done D against the defendant pursuant to the JVA which the defendant ought to correspondingly claim against the third party, the defendant here had however unilaterally chosen to compromise in full and final settlement the payment assessed and certified by the third party pursuant to the contract. In other words, the defendant did not challenge but instead accepted the third party's E certification notwithstanding that it might not have been agreed to between the defendant and the plaintiff. The defendant would be able to maintain the third party action if it had not compromised the claim but instead defend the plaintiff's claim and at the same time seek an indemnity from the third party, to be all assessed by the court. Put simply, the compromise was fatal to the F defendant.

[29] The evidence of the defendant's compromise is plainly seen in its endorsement on the third party's final interim certificate 1 February 2013 as follows:

G *Saya/kami yang menandatangani di bawah mengaku menerima Bayaran Akhir di atas dan setelah meneliti butir-butir yang terkandung di dalamnya bersetuju dengan Bayaran Akhir ini dan mengaku bahawa saya/kami tidak ada tuntutan lanjut di bawah kontrak ini.* (Emphasis added.)

H The defendant endorsed the final interim certificate concurrent with the receipt of the third party's cheque of RM300,000 as recommended by the third party's executive chairman as seen the payment voucher dated 1 February 2015 also endorsed by the defendant. The cheque was encashed on 4 February 2013.

I **[30]** The defendant also furnished to the third party a statutory declaration dated 1 February 2013 signed by Mohd Rizzal bin Shamat that was required under cl 1(f) of the contract which reads:

The release of the final payment is subject to our receipt of your statutory declaration.

[31] The aforesaid statutory declaration contained the following depositions with emphasis added:

> 2. That the Company has received the sum of Ringgit Malaysia Three Hundred Thousand (RM300,000) only from BINTANG KENCACA SDN BD (183733-U) as final payment for CADANGAN PROJEK PEMBINAAN SECARA 'INDUSTRIALISED BUILDING SYSTEM (IBS)' UNTUK SEKOLAH BARU DI SEKOLAH BARU DI NEGERI SELANGOR – Sub-Contract for Construction and Completion for SMK Subang Bestari including Ancillary Buildings and External Works on 1 February 2013.
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> 4. *That the Company shall have no further claims against BINTANG KENCANA SDN BHD*.
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> 5. I am also aware the consequences for a false declaration in respect of the above. (Emphasis added.)

[32] In this application, the defendant in defence in its affidavit averred that another individual passing off as Mohd Rizzal bin Shamat had made the statutory declaration using a false identity card. In addition, the defendant also averred that the payment voucher for the RM300,000 was endorsed by an individual who passed off as Mohd Rizzal bin Shamat.

[33] The defendant's averments were not supported by contemporaneous police report and/or a hand writing expert report confirming that the signature on the statutory declaration and the payment voucher was forged. In other words, they were bare denials.

[34] The consequence of a bare denial is seen in the court of appeal case of *Microsoft Corporation v Yong Wai Hong* [2008] 3 MLJ 309 in the context of defending a summary judgment application and which in my view apply with equal rigour in defending a striking out application. In that case Gopal Sri Ram JCA (as he then was) said the following at p 319:

> [10] In the present instance the bare assertions made in his affidavit filed in opposition to the summons for judgment are insufficient to raise a triable issue warranting the grant of leave to defend. To quote Ackner LJ in *Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21:
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> > *… the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.*
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> > *[11] There is an added factor here. The respondent's assertions in his affidavit were contradicted by independent documentary evidence, demonstrating a want of bona fides in the points raised by him as constituting triable issues.* These are matters which were plainly overlooked by the High Court when it dismissed the appellant's summons.

A [12] For the reasons already given, this appeal was unanimously allowed and judgment entered against the respondent in terms of the appellant's summons. (Emphasis added.)

B **[35]** In my view, the defendant's denials as averred are clearly afterthoughts as they are inconsistent with the other independent facts as disclosed by the documentary evidence. The defendant in this regard did not challenge its own contemporaneous endorsement in the final payment certificate as set out in para 29 above. More importantly, the defendant ignored the fact that it had encashed the cheque of the RM300,000 that could not otherwise have been C received by the defendant if the payment voucher was indeed forged by another unknown individual.

[36] In the circumstances, it is plain and obvious to me that the defendant's claim for indemnity against the third party is frivolous and vexatious as well as D an abuse of court process.

CONCLUSION

E **[37]** It is for the foregoing reasons I have found that the defendant's case is obviously bound to fail and accordingly allowed encl 35 as so ordered.

Application allowed.

F Reported by Kanesh Sundrum

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